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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 770

I. B. ADELMAN,

Petitioner,

v.

PARAMOUNT PICTURES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR DISTRIBUTOR RESPONDENTS IN OPPOSITION

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ERRORS IN PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

These respondents say that the "Questions Presented" are not correctly set forth in the section so entitled, appearing on page 2 of petitioner's brief, for the following reasons:

1. Petitioner's statement of the first question erroneously assumes that there has been a finding of a wrongful monopoly upon which the relief petitioner seeks could be properly founded; and the statement is further erroneous in that it assumes that a decree has been entered which gives protection against competition.

2. The statement of the second question incorrectly assumes that a decree has been entered which contains provisions contrary to the public policy of the antitrust laws.

3. The statement of the third question assumes that petitioner won all material aspects of the antitrust suit and that a valid case of changed circumstances has been shown, neither of which is true.

QUESTIONS ACTUALLY PRESENTED AND REASONS WHY CERTIORARI SHOULD BE DENIED

I. There has been no adjudication against respondents upon which the injunction petitioner seeks could be founded and furthermore the granting of such an injunction is precluded because of petitioner's failure to take a timely appeal upon the entry of the original decree and also because of principles of estoppel and res judicata.

II. The instant decree does not bar petitioner from competing as a first-run theater, does not protect anyone from competition, and is not contrary to the policy of the antitrust laws.

III. The matters involved are not of sufficient public importance to warrant the allowance of the writ under Rule 19(1).

STATEMENT OF THE CASE

These respondents say that petitioner's "Statement of the Case" is not sufficient to inform the Court of the basic facts here involved. It is believed that a chronological summary of prior proceedings will be helpful.

Suit for treble damages and an injunction under the antitrust laws was filed March 29, 1948 (R. 1, 8). There was a jury trial in Houston June 6, 1955, to July 8, 1955 (R. 67, 257). Based on plaintiff's concession in open Court (R. 256-257) the jury was instructed "plaintiff has conceded that he is not entitled to compete for first run * * * against the Loew's State Theater, the Majestic Theater, and the Metropolitan Theater (the three large downtown theaters) * * *" (R. 263). A verdict for $20,000 was returned (R. 67).

A separate hearing on equitable relief was held August 22, 1955 (R. 283) and here plaintiff sought to enjoin the distributors from denying him an equal opportunity to compete "for any exclusive run" (R. 61, 286). The Court on September 16, 1955, entered a judgment for treble damages and granted an injunction but specifically excluded the three large downtown theaters in question from the injunction (R. 67 at 68). There was no appeal.

On February 19, 1957, on motion of the distributor-defendants, the decree was modified to clarify licensing rights as to non-exclusive or multiple first runs (R. 94). At the hearing on this matter plaintiff renewed his effort to obtain an injunction applicable to the large downtown theaters (R. 75, 81, 85). Again he was unsuccessful but did not appeal (R. 94). In these proceedings he placed no reliance upon the closing of the Kirby Theater which at the time of

the modification had been out of business for approximately ten months (R. 248-251).

On May 9, 1958, petitioner filed his present petition to "modify" the decree, seeking again to obtain the previously refused injunction as to the three large downtown theaters (R. 96). In an opinion dated April 1, 1960, the District Court refused the "modification" (182 F. Supp. 217) and the Court of Appeals affirmed (296 F. 2d 308).

Petitioner's "Statement of the Case" is misleading because throughout he labels himself as the "successful party" on all material antitrust issues (Petitioner's Brief, p. 3; see also pp. 10 and 11). He does not disclose the fact that on the prior jury trial he admitted in open court that he had no basis for claiming that he had been wrongfully excluded from competing with the three downtown theaters here involved (R. 256), that the trial Judge by affirmative instructions withdrew such theaters from consideration by the jury (R. 263), and that on the subsequent hearing for equitable relief the trial Judge specifically declined to make findings in petitioner's favor as to such theaters (R. 64-65, Findings 18 and 19; R. 66, Conclusions 1 and 3).

Petitioner makes reference to the closing of the Kirby Theater as a changed circumstance sufficient on which to base a modification of the decree (Petitioner's Brief, p. 5). He does not, however, disclose the fact that he has had his day in Court on this issue. As above noted, *before* his present petition for modification was filed, but *after* the Kirby Theater was closed, the trial Court had under consideration another petition for modification (R. 70-74), and did modify the decree (R. 94-96), at which time petitioner was before the Court contending for exactly the same relief as he now seeks, but without then relying upon the claimed effect of the closing of the Kirby Theater (R. 75-81, 81-84, and 85-90). Petitioner does not disclose that it was this

failure to raise any issue as to the claimed effect of the closing of the Kirby Theater which gave rise to the Court's finding of res judicata and estoppel on this phase of the matter (R. 248-251).

Petitioner's statement also erroneously pictures the decree as protecting and preserving a "first run monopoly" (Petitioner's Brief, pp. 10 and 11). The decree does no such thing. As to the three theaters here involved the situation is exactly the same as if the decree had never been entered. The plaintiff has simply failed in his effort to have these three theaters subjected to an injunction (R. 61 and 68). The absence of a decree as to these theaters does not, however, prevent competition nor does it protect or preserve a monopoly.

Petitioner presents his argument under two points, to each of which respondents will separately reply.

ARGUMENT

I.

(Reply to First Point)

There has been no adjudication against respondents upon which the injunction petitioner seeks could be founded and furthermore the granting of such an injunction is precluded because of petitioner's failure to take a timely appeal upon the entry of the original decree and also because of principles of estoppel and res judicata.

Absence of Adjudication Against Respondents

Petitioner argues his first point representing himself to be the "successful plaintiff" (Petitioner's Brief, p. 8) who "won his antitrust case" (Petitioner's Brief, p. 9). His objective is to subject Houston's three large downtown theaters, Loew's State, the Metropolitan and the Majestic, to

an injunction (Petitioner's Brief, p. 5). Both the District Court and the Court of Appeals have held that as to these three theaters petitioner was not the successful plaintiff and that as to such theaters petitioner did not win his anti-trust case. Such holdings correctly preclude the injunction petitioner seeks.

The fact that petitioner's victory was not a total one is rather dramatically demonstrated by the fact that he sued for $2,436,000 (R. 46) and recovered $60,000, the sum of $20,000 trebled (R. 67). Plaintiff was not successful as to the three downtown theatres, Loew's State, the Metropolitan and the Majestic. Upon the original trial before the jury each of the distributors took the position that in the exercise of its sound business judgment it had concluded that it was to its financial advantage for its films to be first exhibited in one of the large downtown theaters. Evidence was offered to show that such theaters were larger and more lavishly furnished and equipped. It was pointed out that original exhibition in a downtown house built the prestige of a picture. Through such an exhibition not only the theater patrons but also the subsequent run exhibitors, both in the Houston suburban area and in other municipalities in the trade territory, would recognize the picture as a desirable attraction. All of this was shown to be materially beneficial to the distributors because it would substantially increase the film rental revenue the distributor would receive from subsequent run exhibitions both in Houston and the surrounding area. It was shown that if a picture was first exhibited in a theater such as petitioner's Delman the picture after its exhibition there for practical purposes would be dead. The picture would not be accepted by either the public or other exhibitors as a major attraction. Receipts from other showings would be disappointing and the number of subsequent run exhibitors who would be interested in playing the film would be materially reduced.

(R. 53-54 — only excerpts of the testimony on the jury trial are in the printed record — for similar testimony given on the hearing for equitable relief see R. 373-374, 430-431, 455-456, 474-475, 487 and 511.)

By the time the jury trial was concluded petitioner had conceded on the record that he did not compete with the three principal downtown theaters for major first run astractions and the trial Judge so charged the jury. The record discloses that the following took place during the preparation of the Court's charge (R. 256-257):

"The Court:

"In the first paragraph • • • I have eliminated the phrase 'in a downtown theatre' and have substituted therefor 'in the Majestic, Loew's and Metropolitan Theatres.'

" • • •

"Mr. McCorquodale (Counsel for Petitioner):

"In view of the fact that *we have conceded we don't compete with those big three*[1] for the pictures, I am just wondering if we need that?

"(Discussion.)

"The Court:

"I am going to eliminate the paragraph. They are not contending for first run in this case.

"Mr. Binion (Counsel for Exhibitors):

"Your Honor, I think we should have an instruction that they are not.

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[1] Unless otherwise noted where emphasis appears in this brief such has been added by the writers.

"The Court:

"I am going to eliminate it. Mr. Reporter, and I am going to add this — I am going to charge as follows — put it on a separate sheet:

"You are instructed that the plaintiff has conceded that he is not entitled to compete[2] for first run exhibition in the City of Houston against the Loew's State Theatre, the Majestic Theatre, and the Metropolitan Theatre, but does contend that he is entitled to compete for first run exhibition against the Kirby Theatre and any other theatre operated by the exhibitor defendants." (See also R. 263).

In view of the foregoing affirmative instruction it certainly cannot be contended that the jury made an unfavorable finding against respondents as to these three theaters which were specifically excluded from its consideration.

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[2] In a footnote appearing on page 6 of his brief petitioner is very critical of that portion of the Court of Appeals' opinion wherein it was stated: "It was expressly determined that * * * (the Delman) was not in competition with appellees' Loew's State, Metropolitan or Majestic Theaters." Petitioner implies that such is in conflict with Judge Cecil's findings and statements appearing in the brief of the exhibitor-respondents. As noted above, the Court's statement is almost word for word the same as the concession made by petitioner's counsel during the trial and the charge which Judge Cecil gave to the jury. Petitioner's attempt to develop a conflict between such statement and the brief of the exhibitor-respondents is simply a play on words. The word "competition" has been used to refer to different things. In the concession made by petitioner's counsel and in Judge Cecil's charge to the jury, quoted above, as well as in the Court of Appeals' opinion, the word was used in referring to competition for first run film. In the exhibitors' brief the word had reference to competition between theaters for patronage. There is a material difference. It may be that because of its size and location a neighborhood theater, such as the Delman, is not in a position to compete with the downtown theaters for first run film since it cannot offer sufficiently attractive terms as to film rental. At the same time the downtown theater will be in competition with the neighborhood theater for patronage because the downtown theater draws patrons from all neighborhoods.

After the jury trial was concluded the Court had a separate hearing on equitable relief. At this hearing petitioner conceded that for the period of time considered by the jury he had no basis for an injunction against the large downtown theaters but again sought such an injunction on the claimed "as of now situation". This is clear from the following exchange between counsel for petitioner and the Court (R. 286):

> "THE COURT: Was it said upon the trial of this case that the Delman doesn't compete for first run against Loew's State and the Metropolitan?
>
> "MR. WRIGHT (Counsel for Petitioner): That is true. That was as of that period. That concession was certainly made insofar as the award of any damages on a comparison with those theaters was based. But I don't think, your honor, that that concession, for the purpose of the jury submission, prevents us from now contending that *as of now* in the Delman, * * * the situation is this, as I see it:" [Counsel then continued with an argument that exhibitions in the River Oaks Theater demonstrated that a theater without a downtown location could occasionally compete with the large downtown theaters for a top picture by offering extended playing time.]

After the hearing on equitable relief the Court, however, specifically declined to extend the jury's finding and refused the requested injunction as to the Metropolitan, Majestic and Loew's State Theaters. In interpreting the decree it must be remembered that at the time the same was entered there were five theaters in Houston operating on a first run basis. The trial Judge was careful in every instance to make it plain that no violation of the antitrust laws was found with respect to three of these theaters (Loew's State, the Metropolitan and the Majestic), and that any finding

against the defendants went no further than the jury finding and was limited to the other two theaters (the Kirby and the River Oaks). The Court's Findings of Fact clarify this. There the following appears:

> "8. The defendant Interstate Circuit is successfully operating the River Oaks Theater in Houston upon an *exclusive first run* art policy and has successfully exhibited some of defendants' 'A' pictures for extended engagements of two weeks or more.
>
> "9. The only *other theaters* in Houston operating on a first run policy are Interstate's Metropolitan, Majestic and Kirby Theaters and Loew's State, all of which ordinarily exhibit a film for one week. (R. 62-63.)
>
> " * * *
>
> "19. Unless the plaintiff is given an equal opportunity to compete *with the Kirby*[3] *and River Oaks Theaters* for an exclusive first run of all films which the distributor-defendants may offer for exhibition in Houston *and do not license on such run to Loew's State, Majestic or Metropolitan Theaters*, the defendants' conspiracy will continue and plaintiff will suffer substantial irreparabe injury." (R. 65.)

Equal care was exercised by the Court in limiting his Conclusions of Law. The following should be noted:

> "1. The defendants have been found *by the jury's verdict* in this case to have violated Sections 1 and 2 of the Sherman Act by *conspiring* with each other to monopolize the first run and second run exhibition of films in Houston, Texas. (R. 66.)
>
> " * * *

[3] The evidence showed that the Kirby normally exhibited first run film that had been rejected by the Metropolitan, Majestic and Loew's State (R. 47-48, 49-50, 50-51, 51-52 and 52-55). See petitioner's admission to this effect in Sachs' affidavit (R. 75 at 79).

"3. The *foregoing* conspiracy has not ended, and the plaintiff is threatened with further injury *therefrom* unless an injunction is issued herein." (R. 66.)

The "foregoing conspiracy" referred to by the trial Judge was specifically limited to that "found by the jury's verdict" which could not possibly have included a conspiracy relative to the Loew's State, Metropolitan and Majestic Theaters since the Court by his charge, quoted above, affirmatively withdrew from the consideration of the jury the practices relative to such theaters with the instruction that "the plaintiff has conceded that he is not entitled to compete for first run exhibition in the City of Houston against Loew's State Theater, the Metropolitan Theater and the Majestic Theater".

The trial Judge ended his Conclusions of Law with the following:

"4. In order to prevent irreparable injury to the plaintiff and to end *such conspiracy* (a) all of the defendants should be enjoined from continuing *that conspiracy*, (b) the distributor-defendants should be enjoined from denying to the plaintiff an equal opportunity with the exhibitor-defendants to compete for an exclusive first run of any feature film offered in Houston, Texas, *except those licensed on such run to the Loew's State, Metropolitan or Majestic Theaters*. * * *." (R. 66.)

Again, "such conspiracy" and "that conspiracy" specifically referred to that "found by the jury's verdict" which as above noted did not include conduct relative to the Loew's State, Metropolitan or Majestic Theaters. It will be further noted that to make this abundantly clear the trial Judge specifically excluded such theaters from the injunction granted. (Decree, Paragraph 3-A, R. 68.)

There is no doubt about the specific nature of the trial Judge's rulings against petitioner as to the Loew's State,

Metropolitan and Majestic Theaters. Those rulings emphatically denied that which petitioner sought. For example, petitioner's proposed finding No. 22 was directed against all theaters and all runs, the requested finding being against "Interstate's Theaters and Loew's State for such exclusive runs as the distributor-defendants may offer" (R. 59); however, the Court's finding in response excluded first runs licensed "on such run to Loew's State, Majestic or Metropolitan Theaters" (Finding 19, R. 65). Again petitioner's proposed conclusion of law No. 4 was to include "any exclusive run offered in Houston" (R. 60); however, in the Court's conclusion of law No. 4 he again excluded first runs "licensed on such run to Loew's State, Metropolitan or Majestic Theaters" (R. 66). The injunction proposed by petitioner was as follows:

> "Each of the distributor-defendants is hereby enjoined from denying to the plaintiff an equal opportunity with the exhibitor-defendants to compete for any exclusive run of a feature film offered in Houston." (R. 61.)

In response to this proposal the injunction allowed was as follows:

> "That each of the distributor-defendants * * * are hereby enjoined from:
>
> "A. Denying to the plaintiff an equal opportunity with the exhibitor-defendants * * * to compete for an exclusive first run of any feature film offered in Houston, Texas, *except such films as may be licensed for first run exhibition in the Loew's State, Metropolitan, or Majestic Theaters;* * * *." (Judgment, Paragraph 3, R. 68.)

In the face of the foregoing record it is difficult to understand how petitioner can class himself without limitation as "the successful plaintiff" who "won his antitrust case".

Failure to Appeal

Petitioner took no appeal from the adverse judgment but sought to avoid the effect of the same by nothing more than his present petition to modify the decree, filed more than two years later (R. 96), supported by nothing more than his own conclusory affidavit (R. 133-141). The District Court correctly held that the prior adjudication was binding. The District Court's specific ruling was as follows:

> "The record in this case is clear. At every juncture plaintiff contended that he should be accorded the right to compete against the Loew's State, Metropolitan, and Majestic Theatres. At ever juncture he lost. From his defeat he took no appeal. He now proposes that the prior adjudication be disregarded and that he be accorded the relief heretofore specifically denied. But the prior adjudication is binding on plaintiff. * * *
>
> "An examination of the record clearly shows that the Court found no violation of the antitrust laws with respect to the Loew's State, Metropolitan, and Majestic Theatres and that any finding against defendants was limited to the two other first-run theatres, the Kirby and River Oaks. * * * (R. 242-243.)
>
> * * * *
>
> "From the foregoing it is apparent that if plaintiff has any cause for complaint against defendants as to licensing practices in the Loew's State, Metropolitan, and Majestic Theatres, such must be founded upon a new cause of action arising subsequent to the decree herein. Down through the proceedings, every adjudication as to these theatres has been favorable to defendants. The accepted way for the assertion of new causes of action is through the filing of a new law suit, not through a petition to modify the decree." (R. 245-246.)

The Court of Appeals reached the same conclusion, correctly holding as follows:

"The District Court, having retained jurisdiction, could entertain a petition for the modification of the injunction, and it could no doubt have exercised such jurisdiction even though it had not been expressly reserved. United States v. Swift & Co., 286 U. S. 106, 52 S. Ct. 460, 76 L. Ed. 999. It does not follow, however, that issues which have been submitted to the court and have been decided by it may be relitigated upon an application for modification. A review of the determination of such issues and the correction of an erroneous decision may be accomplished by the established appellate procedures. * * * any modification of the injunction such as is now sought would be a reversal of the determination of an issue decided by the court and accepted by the appellant."[4]

Closing of Kirby Theater

It is respectfully submitted that petitioner's failure to appeal from the original decree wherein his injunction was refused precluded the granting of such injunction on his present petition without regard to his contentions about a modification due to changed circumstances. Petitioner seeks to ignore the fact that in the leading case on th subject, *United States* v. *Swift*, 286 U. S. 106, 119, (1932), this Court held:

" * * * We are not at liberty to reverse under the guise of readjusting."

Here petitioner is not seeking to modify an existing injunction but rather to obtain an injunction previously refused because of his failure to establish a basis for injunctive relief with respect to the theaters in question. Petitioner wants an injunction as to Loew's State, the Majestic and the Metropolitan Theaters which injunction not only has never been granted but on prior proceedings, as shown above,

[4] The opinion will be found in 296 F. 2d 308, 309 (CCA 5th, 1961).

was declined although specifically sought by petitioner. It is thus readily apparent that petitioner is not seeking to "modify" or "readjust" but on the contrary he is seeking to "reverse" the prior denial of the injunction. He has never obtained the prerequisite findings for an injunction. This is a basic point. The procedure sought to be employed is not appropriate. The District Court and the Court of Appeals have both so held.

Completely apart from the foregoing it is, however, additionally true that prior to the filing on May 9, 1958 (R. 96) of the present petition for modification petitioner had already had his day in Court as to the effect of the closing of the Kirby Theater. This stems from the fact that the distributors previously, on October 9, 1956, filed a motion for modification of the decree in order to clarify their right to license pictures on non-exclusive or multiple first runs (R. 70-74). Petitioner appeared at the hearing held on the matter and through a formal memorandum filed by his attorney (R. 85-90), an affidavit by his booker (R. 75-81), and an affidavit of his own (R. 81-84), he sought to have the same provision of the decree as that now involved, paragraph 3-A, modified in exactly the same way as he proposed on the petition which is now before the Court. The trial Court on such prior proceeding, after a hearing, modified the decree as requested by the distributors, the order of modification being dated February 19, 1957 (R. 94-96). At this time the Kirby Theater had been closed for ten months, but the trial Judge did not grant petitioner the injunction against the Metropolitan, Majestic and Loew's State Theaters which he was then seeking for the second time. When petitioner's present petition came before the District Court it was there held that the prior modification proceeding gave petitioner a reasonable opportunity to present any claim for modification predicated upon the effect of the closing of the Kirby Theater and that this estopped him

from subsequently assigning that closing as a reason for modifying the decree. The District Judge's able disposition of this point was as follows:

> "If plaintiff has any ground for relief, it must be contained in his pleading. The only pleading he has before the court is his petition to modify the decree. There is no new matter contained therein except allegations concerning the Sharpstown Theatre (Paragraph 6), the pertinent parts of which were denied by defendants and on which plaintiff offers no proof, and further allegations (Paragraph 3) relative to the closing of the Kirby Theatre. The conclusory statements in plaintiff's affidavit do not constitute new matter. Plaintiff concedes that the Kirby Theatre was closed on April 16, 1956 [R. 118] * * * and the petition to modify the decree (Paragraph 6) affirmatively demonstrates that more than ten months thereafter the court had under consideration and modified Paragraph 3-A of the decree, the very paragraph now under consideration.
>
> "The record discloses that plaintiff appeared at the hearing held on the matter, filed a four-page memorandum signed by his then attorney, Robert L. Wright, Esq., [R. 85-90], a seven-page affidavit signed by his booker, Harry Sachs, [R. 75-81], and a three-page affidavit which plaintiff himself signed [R. 81-4]. Despite the fact that the Kirby Theatre had been closed for months and the further fact that said theatre specifically was mentioned (see pg. 5 [R. 79, Par. 4] of Sachs' affidavit), there is no allegation in any of these documents that the Kirby Theatre had been closed for months and that such closing had an adverse effect upon plaintiff's business. The relief sought by plaintiff was exactly the same then as it is now, but he did not assign the closing of the Kirby as a ground for such relief. The following statement of plaintiff's then position appears on pages 2 and 3 of the memorandum filed in December, 1956, by his attorney:

"' * * * The existing paragraph 3-A should therefore be modified to read as follows:

"'Denying to the plaintiff an equal opportunity with the exhibitor-defendants * * * to compete for an exclusive first run of any feature film offered in Houston, Texas; * * *'

"By its order of February 19, 1957, the court modified Paragraph 3-A of the decree to permit multiple first-run distribution as sought by the distributor defendants; however, it again ruled against plaintiff with respect to the Loew's State, Metropolitan, and Majestic Theatres by refusing to adopt the amendment, quoted above, contended for by plaintiff.

"Again the principles of res judicata, discussed above, become applicable. They preclude plaintiff from seeking relief now on the basis of the closing of the Kirby Theatre, since he failed to assert such a claim when he was in court with an opportunity to do so months after such theatre was closed. In the Restatement of Judgments (American Law Institute 1942, Secs. 1 and 63), the following applicable rules are announced:

"'Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.' (Section 1, p. 9).

"'The principle stated in this section is applicable although the unsuccessful party in fact had no knowledge of the grounds for setting aside or reversing the judgment until his right was lost. The fact that under the particular circumstances the unsuccessful party cannot by direct proceedings in the action have the judgment set aside may cause hardship to him; but public policy requires that the hardship in the par-

ticular case should yield to the general public interest in favor of putting an end to litigation.' (Section 1, comment b, pp. 10-11.)

"'Where a judgment on the merits is rendered in favor of the defendant, the plaintiff is precluded from subsequently maintaining an action on the same cause of action although he presents a ground for the relief asked other than those presented in the original action. * * *' (Section 63, pp. 257-8).

"'The rule has the effect of coercing the plaintiff to present all of his grounds for recovery in the first proceeding, which is similar to the coercion upon the defendant to produce all of his defenses to the claim set up by the plaintiff.' (Section 63, comment a, p. 258.)

"From the record it is obvious that any issue as to the effect of the closing of the Kirby Theatre is an afterthought which comes too late." (R. 248-251.)

It should be noted that in the Restatement, quoted by the District Judge, it is stated that the principle "is applicable although the unsuccessful party in fact had no knowledge of the grounds for setting aside or reversing the judgment until his right to take further proceedings in the action was lost". The opinion points out that the Kirby Theater was mentioned in one of the affidavits filed by petitioner. Actually the affidavit in question went further and referred to the *closing* of the Kirby Theater. In such affidavit, that of petitioner's booker, Harry Sachs, the following is found (R. 75 at page 79):

"* * * I do not believe, however, that their (the distributors) claim is made in good faith as a basis for modification of Paragraph 3-A of the decree. They (the distributors) only reached this conclusion *after Interstate's Kirby Theatre was converted to commercial use.* Until that occurred *last spring*, all of these

defendants were content to put their B pictures into the Kirby for an exclusive first run * * *."

Authorities demonstrate that the ruling of the District Judge was entirely correct. With the claim which petitioner had theretofore unsuccessfully brought before the Court on two separate occasions petitioner sought exactly the same relief and on each occasion the same cause of action

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[5] Since the Kirby was exhibiting "B" (second choice) pictures its closing could have no adverse effect upon petitioner's operations. The conclusory statements appearing on pages 7-8 of Petitioner's Brief to the effect that the decree opened up one-fourth of the first run product to petitioner and that such was cut off when the Kirby closed is, as noted above, contradicted by petitioner's own record. All of the evidence was to the effect that the distributors first tried to get their pictures shown in the Metropolitan, the Majestic or the Loew's State (R. 47-48, 49-50, 50-51, 51-52 and 52-55). If the distributors could not get such an engagement they would then try the Kirby. (R. 48, 50, 51, 52, 54-55). The flow of pictures would be downward from the larger theaters. The Kirby was downstream from the Majestic, Metropolitan and Loew's State. The effect to be anticipated from the closing of the Kirby would be to make more pictures available to the Delman. All of the proof before the Court showed that petitioner's Delman exhibited first runs a greater percentage of the time after the Kirby closed than it did before — 25.0% for such first runs before the Kirby closing but 68.9% after the closing. (See Appendix to this Brief, particularly Table No. 3.) Petitioner filed no contrary proof. The Court's rules, Rule 25, Rules of the U. S. District Court, S.D. Tex., 11 Fed. Rule Service 1016, require that all evidence supporting a motion be filed with the motion and "that if such matters shall, because of failure to file briefs, affidavits, etc., * * * not have been properly prepared for submission, the Court may, for that cause * * * dismiss same". It should also be noted the record demonstrates that early in the proceedings petitioner had conceded the Kirby was not of prime importance. At the hearing on equitable relief held on August 22, 1955 (R. 283), counsel for petitioner said: "* * * the River Oaks rather than the Kirby has become the third Interstate Theater in terms of gross receipts. * * *. It has replaced the Kirby as Interstate's third highest grossing theater" (R. 285). Also petitioner himself then testified that the River Oaks was outgrossing the Kirby (R. 299).

was involved. *Baltimore S. S. Co.* v. *Phillips*, 274 U.S. 316, 321 (1927); *F. L. Mendez & Co.* v. *General Motors Corp.*, 161 Fed. 2d 695, 698 (CCA 7th, 1947); *Williamson* v. *Columbia Gas & Elec. Corp.*, 91 F. Supp. 874 (D. Del. 1950), aff'd 186 Fed. 2d 464 (CCA 3rd, 1950), cert. den. 341 U.S. 921 (1951). When petitioner was brought before the Court on the distributors' petition for modification Rule 13, Federal Rules of Civil Procedure, made it mandatory that petitioner support his counterclaim with any contentions to be predicated upon the closing of the Kirby Theater. In *Williamson* v. *Columbia Gas & Elec. Corp.*, *supra*, the Court said (91 F. Supp. 877):

> "• • • If a suit involves the same parties and the same cause of action as in a suit which has been finally adjudicated, the parties will be bound not only by what was actually litigated and determined, *but also by those germane matters which might, with propriety, have been litigated and determined.*"

For other cases illustrating the full extent of compulsory counterclaims see *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948); *Eastern Transportation Co.* v. *U. S.*, 159 Fed. 2d 349, 351 (CCA 2nd, 1947); *Parmelee* v. *Chicago Eye Shield Co.*, 157 Fed. 2d 582, 586 (CCA 8th, 1946); *United States* v. *Eastport S. S Corp.*, 255 Fed. 2d 795, 801 (CCA 2nd, 1958); *E. J. Korvette Co., Inc.*, v. *Parker Pen Co.*, 17 F.R.D. 267, 268 (S.D. N.Y. 1955).

Respondents believe the District Judge was entirely correct in his conclusion "that any issue as to the effect of the closing of the Kirby Theater is an afterthought which comes too late". (R. 251.)

II.

(Reply to Second Point)

The instant decree does not bar petitioner from competing as a first run theater, does not protect anyone from competition, and is not contrary to the policy of the anti-trust laws.

In his second point Petitioner has come forward with the absurd conclusion: "Under the terms of the decree and the holding of the Court below, petitioner's Delman is prevented from competing with exhibitor-respondents' three first-run theaters." He also refers to: "The holding of the Court below that petitioner's Delman is not entitled to compete with Loew's State, the Metropolitan and Majestic Theaters." (Petitioner's brief, pp. 9, 10).

The decree contains no such terms and the Courts below have made no such holdings. Petitioner's reasoning is completely muddled. It can be straightened out only by a fresh start.

In the beginning each distributor owns its copyrighted films and can license them to whomever it pleases. Petitioner sues and says a conspiracy exists to prefer the exhibitor-defendants and asks that the distributors be enjoined from denying him an equal opportunity with the exhibitor-defendants to compete for each film. In other words, any time a distributor offers a film to one of the exhibitor-defendants it must also offer it to the plaintiff. Each distributor denies that it is a party to any conspiracy and for varying reasons says that it has offered its pictures to the Metropolitan, Majestic or Loew's State not because of any conspiracy but because it is to its financial advantage to sell them there — such theaters are larger, draw from a wider area, build the prestige of the picture and enhance the possibility of more revenue from subsequent run exhi-

bitions (R. 53-54, 373-374, 430-431, 445-446, 474-475, 487, 511). The Court simply refuses the injunction. This obviously amounts to a finding of no conspiracy as to such theaters because had a conspiracy been found these theaters would have been subjected to the injunction. As to this aspect of respondents' business the Court has left the parties exactly where he found them — free to deal with each other as they see fit but still subject to all applicable laws.

Petitioner's entire argument is a play on words. He attempts to twist the refusal of an injunction into a denial of a right to compete. The decree does no such thing. It could have as well been worded: "The request for an injunction as to the Loew's State, Metropolitan and Majestic Theaters is refused."

The distributors certainly do not concede that the decree vests any playing position, preferred or otherwise, in the exhibitor-respondents. The decree clearly means simply that if a distributor deems its financial interests will be best served by selling a picture to one of the three downtown theaters it can do so without offering the same to the Delman. On the other hand, it is just as free to offer the picture to the Delman without going to one of the larger theaters. Should, however, a distributor at any time refrain from offering a picture to the Delman because of the existence of an unlawful conspiracy or combination in restraint of trade the Courts will be open to petitioner. Upon proof of any such unlawful conduct, the existence of which is denied, it is to be anticipated that relief would be prompt and effective.

III.

The matters involved are not of sufficient public importance to warrant the allowance of the writ under Rule 19(1).

Petitioner seeks to convey the impression that some matter of public policy under the antitrust laws is involved. Respondents say that this is not so. On the contrary the granting of the writ would do violence to well established precedents for the administration of justice.

Petitioner has not conducted this case as if it involved a matter of particular importance to him, much less to the public. It has been many times said that actions speak louder than words. If petitioner actually believed in his cause with the fervor he by his words attempts to picture, his actions would have been different in the following material particulars:

(1) He would not have conceded during the trial that his Delman Theater was not in a position to compete for first run films with the large downtown theaters (R. 256-257).

(2) When the Court declined (after listening to his evidence at the hearing on equitable relief) to give him the injunction he sought, he would have appealed (R. 61 and 68).

(3) When the distributors instituted proceedings to modify the decree he would have asserted the closing of the Kirby Theater as a basis for the unwarranted injunction he has always dreamed of (R. 70-73, 81-84, 85-89).

(4) When the Court declined his injunction at the distributors' hearing, again he would have appealed (R. 94).

(5) After instituting his present petition to "modify" the decree, he would not have waited for more than sixteen months before filing anything in support of the same (R. 96, 133, 232).

(6) He would have moved the submission of his own petition to "modify" rather than waiting for the distributor-defendants to do so (R. 232-233).

(7) He would have instituted a new suit to establish the existence of his claimed conspiracy rather than attempting through his present novel approach to twist adverse findings into a basis for the injunction repeatedly denied him (R. 246).

Petitioner's inconsistent actions perhaps demonstrate better than anything else the absence of merit. No element of public importance is present.

CONCLUSION

It is respectfully submitted that the disposition of this case below was in all things proper. For the lower Courts to have ruled otherwise would have been to permit petitioner to circumvent and in effect reverse the adjudications against him upon the basis of nothing more than a tardy motion and his own conclusory affidavit. As the District Judge said in his opinion: "If plaintiff has any cause for complaint • • • such must be founded upon a new cause of action arising subsequent to the decree herein. • • • The accepted way for the assertion of a new cause of action is through the filing of a new lawsuit, not through a petition to modify the decree" (R. 245-246).

This case depends primarily upon its own facts and was correctly decided below. No matter of public importance is involved. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this brief were upon the 26 day of March, 1962, delivered to Gaius G. Gannon, Jr., Esq., counsel for petitioner, and to Jack Binion, Esq., counsel for the exhibitor-respondents, and upon the same date copies were mailed to Thomas C. McConnell, Esq., Francis J. McConnell, Esq., and Messrs. McConnell, Paschen & Curtis, 134 S. LaSalle Street, Chicago 3, Illinois, additional counsel for petitioner, and to Jos. Irion Worsham, Esq., 1817 Republic National Bank Building, Dallas 1, Texas, additional counsel for the exhibitor-respondents, all by air mail, postage prepaid.

William R. Brown
Attorney for Distributor-Respondents

APPENDIX

TABLE NO. 1

FIRST RUN EXHIBITIONS OF DELMAN THEATRE DURING KIRBY THEATRE OPERATIONS (11/17/55 to 4/16/56)

Picture	Play Date	No. Days Played	Gross	Rental
Trail of Lonesome Pine Shepherd of the Hills	11/17-23/55	7	$ 2,020.75	$ 707.26
Big House U.S.A. Bullet For Joey	12/8-14/55	7	1,640.85	492.25
30 Seconds Over Tokyo A Guy Named Joe	12/21-28/55	8	2,115.00	727.55
Flame of Island Vanishing American	2/23-27/56	5	1,828.55	548.56
Night Mare Alley Where Sidewalk Ends	3/11-14/56	4	1,265.15	316.29
Queen Bee Inside Detroit	4/10-16/56	7	1,823.25	638.14 100.00
Totals		38	$ 10,693.53	$ 3,530.05

(Source: R. 145-148)

Note: The decree is dated September 16, 1955 (R. 67). The time period covered by this table begins with the first exhibition in the Delman of a first run picture *contracted* for *after* the decree and concludes with the closing of the Kirby Theater.

TABLE NO. 2

FIRST RUN EXHIBITIONS OF DELMAN THEATRE AFTER KIRBY THEATRE CLOSED (4/17/56 to 9/14/59)

Picture	Play Date	No. Days Played	Gross	Rental
Glory Naked Sea	4/17-23/56	7	$ 1,812.85	$ 775.00 75.00
There's Always Tomorrow Red Sundown	4/24-30/56	7	2,024.80	900.00
Slightly Scarlet Postmark For Danger	5/1-7/56	7	2,092.50	875.00 100.00
River Changes Steel Jungle	5/8-14/56	7	1,458.65	437.59
Black Tuesday Man Fish	5/22-28/56	7	1,499.45	449.83
Our Miss Brooks Top Banana	5/29-6/4/56	7	1,925.00	468.85 50.00
3 Bad Sisters Storm Fear	6/5-11/56	7	1,835.35	550.60
Naked Street Top Gun	6/28-7/3/56	6	1,919.95	575.98
Top of World Fort Yuma	7/7-10/56	4	1,421.30	436.39
Dallas Distant Drums	7/21-25/56	5	1,896.40	474.10
Killers Loose Quincanon Frontier Scout	7/28-8/1/56	5	2,080.90	624.27
Black Sheep Creeping Unknown	8/9-13/56	5	1,960.10	588.03
The Killing Nightmare	8/16-20/56	5	2,062.00	515.50
Rebel in Town Emergency Hospital	9/2-5/56	4	1,750.05	437.51 75.00
Annie Get Your Gun	9/16-19/56	4	801.00	240.30
While the City Sleeps Brain Machine	9/27-10/3/56	7	1,824.00	600.00 75.00

(Source: R. 149-158)

TABLE NO: 2 (Cont'd)

Picture	Play Date	No. Days Played	Gross	Rental
Two Years Before Mast Virginian	10/4-10/56	7	$ 1,948.00	$ 584.40
The Unconquered Leather Saint	10/11-17/56	7	2,007.80	602.34
Great Day in Morning Murder on Approval	10/18-23/56	6	1,559.40	467.82 75.00
Kiss Before Dying U.F.O.	10/28-31/56	4	1,086.70	271.67 75.00
World in My Corner Day of Fury.	11/8-14/56	7	1,558.75	467.62
These Wilder Years	11/15-21/56	7	1,669.45	500.84
Outside the Law Behind High Wall	11/25-28/56	4	968.80	290.64
High Noon Moon is Blue	12/2-5/56	4	1,407.40	351.77
Vagabond King Stratton Story	12/6-12/56	7	1,707.85	512.35 100.00
Storm Over Nile	12/16-19/56	4	809.90	202.48
Heidi and Peter Northwest Passage	12/20-24/56	5	878.65	219.66 100.00
Citizen Kane	1/1-7/57	7	3,050.00	915.00
Man From Del Rio The Boxx	1/10-14/57	5	1,500.40	450.12
Reprisal Cha Cha Boom	1/15-19/57	5	840.35	210.09
Boom Town	1/23-26/57	4	1,192.85	298.21
Yearling	1/27-30/57	4	957.30	100.00
Mutiny on Bounty	2/24-27/57	4	1,254.85	313.71
Silent World	3/28-4/29/57	33	17,773.00	5,601.70
3 Brave Men	4/30-5/6/57	7	3,274.30	750.90
Rebecca Third Man	5/7-13/57	7	3,739.20	1,121.76
Mr. Cory Kelly and Me	5/14-20/57	7	2,845.20	908.32 250.00

TABLE NO. 2 (Cont'd)

Picture	Play Date	No. Days Played	Gross	Rental
Green Dolphin Street Carmen Jones	5/28-6/2/57	6	$ 2,718.70	$ 667.17 50.00
Shootout on Medicine Bend Young Man With a Horn	6/3-9/57	7	2,592.95	748.88 100.00
Lost Horizon Joe Macbeth	6/10-16/57	7	2,508.70	602.17 100.00
*The Strange One The Killing	6/17-24/57	8	3,646.10	1,075.51 30.00
Monster Challenged World The Vampire	6/25-7/1/57	7	4,034.45	1,210.33
Public Pidgeon #1	7/2-8/57	7	5,177.45	2,070.98
Abandon Ship The Barbarian	7/9-15/57	7	3,447.00	1,034.10
The Brave One	7/16-29/57	14	9,337.95	3,366.60
Tarzan & Lost Safari	7/30-8/12/57	14	8,128.00	2,841.42
Trooper Hook Fury at Sundown	8/13-19/57	7	3,861.30	1,158.39
Man Who Turned to Stone Zombies of Moratav	8/20-26/57	7	3,690.20	1,291.57
Midnight Story Song of South	8/27-9/2/57	7	3,832.00	804.60 150.00
Seventh Sin Living Idol	9/3-9/57	7	2,432.00	729.60
Torero	9/10-23/57	14	7,368.10	2,339.40
Brother Rico Domino Kid	10/1-7/57	7	1,866.40	522.42
Tip On a Dead Jockey Decision Against Time	10/15-21/57	7	1,732.00	519.60
Flying Leathernecks Sea Devils	10/22-28/57	7	2,300.35	100.00
Gunsight Ridge Enemy From Space	10/29-11/4/57	7	2,175.30	652.59
Johnny Trouble James Dean Story	11/5-11/57	7	2,919.40	729.85

TABLE NO. 2 (Cont'd)

Picture	Play Date	No. Days Played	Gross	Rental
Quantez	11/12-18/57	7	$ 2,017.70	$ 504.42
Lonely Man	11/19-25/57	7	2,346.60	561.65
Gold of Naples				100.00
Sea Wife	11/26-12/2/57	7	2,352.80	921.12
Adventure Robinhood				50.00
Short Cut to Hell	12/3-9/57	7	1,431.80	100.00
Stowaway Girl				332.95
Action of Tiger	12/10-16/57	7	2,061.25	489.06
Hired Gun				
Black Scorpion	12/17-23/57	7	1,336.90	334.22
Black Patch				
Story of Esther Costello	12/24-31/57	8	3,198.20	1,400.00
Girl in Black Stockings	1/15-21/58	7	1,456.75	364.19
Satmo The Great				
King Solomon's Mine	1/22-2/24/58	34	24,453.25	6,113.46
Zero Hour	3/4-10/58	7	1,495.75	448.73
Decision at Sundown	3/11-17/58	7	2,000.40	500.10
Beyond Mombasa				
California	3/18-24-/58	7	1,933.50	483.37
Desert Fury				
The East Paradise	3/25-31/58	7	1,625.50	406.37
Hidden Fear				
7 Brides for 7 Brothers	4/1-15/58	15	7,022.93	1,885.17
Day of the Bad Man	4/21-28/58	8	1,285.70	271.42
Let's Be Happy				200.00
Lafayette Escadrille	5/6-12/58	7	1,667.45	666.98
Female Animal	5/13-19/58	7	1,632.55	390.64
Tammy and The Bachelor				70.00
Peyton Place	6/5-11/58	7	2,127.70	851.08
Adam and Eve	6/12-23/58	12	6,409.80	1,689.33
Stage Struck	6/24-30/58	7	3,548.25	1,238.39
Another Time, Another Place	7/1-7/58	7	3,480.31	1,218.10

TABLE NO. 2 (Cont'd)

Picture	Play Date	No. Days Played	Gross	Rental
Return of Dracula Flame Barrier	7/8-14/58	7	$ 3,266.55	$ 816.64
Across the Bridge Triple Deception	7/15-21/58	7	2,122.35	530.59
The Goddess The Line-Up	7/22-8/4/58	14	6,657.15	1,838.17
The Snorkel	8/30-9/8/58	10	4,043.10	1,544.21
Streetcar Named Desire	9/30-10/13/58	14	6,355.95	2,200.00
White Wilderness	10/14-12/8/58	56	39,953.90	14,266.07
Party Crasher As Young as You Are	12/9-15/58	7	1,232.10	369.63
Gun-Runners Cop-Haters	1/15-21/59	7	1,982.65	594.79
China Doll Fear-Makers	1/29-2/4/59	7	1,617.00	485.10
Silent Enemy	2/5-18/59	14	5,785.85	1,617.90
Mobster Intent to Kill	3/24-30/59	7	1,772.70	531.81
The Land of the Pharoahs Helen of Troy	4/28-5/4/59	7	2,554.45	766.33
Stalag 17 Place in the Sun	5/5-18/59	14	5,721.15	1,611.40
**Around the World in 80 Days	5/19-6/29/59	42	25,728.75	12,046.70
Old Man of the Sea	6/30-7/28/59	29	17,799.05	6,841.36
World, Flesh & The Devil First Man in Space	8/12-18/59	7	2,913.55	984.74 100.00
Compulsion	8/19-9/14/59	27	16,651.00	6,070.82
Totals		858	$375,194.84	$122,766.64

* In the printed record (R. 153) the printer omitted the run for this picture. It is, however, shown as a first run in plaintiff's answers to the interrogatories.

** By plaintiff's amended answers, (R. 219) the run on this picture was corrected from "1st break" to "1st regular run".

TABLE NO. 3

DELMAN THEATRE

COMPARISON OF PLAYING TIME DEVOTED TO FIRST AND SUBSEQUENT RUN EXHIBITIONS

COMPUTED ON CALENDAR DAYS

During Kirby Theatre Operation
(11/17/55 to 4/16/56)

All Pictures		First Runs		Subsequent Runs	
Days	%	Days	%	Days	%
152	100%	38	25.0%	114	75.0%

After Kirby Theatre Closed
(4/17/56 to 9/14/59)

1246	100%	858	68.9%	388	31.1%

Source: Tables 1 and 2; R. 145-158)